No. 85-1204

Supreme Court, U.S.
FILED
FEB 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CHARLES TERRY,

Petitioner,

—v.—

MARTIN STONE, HARVEY L. KARP, GEORGE H. LEVINE, and MONOGRAM INDUSTRIES, INC., a corporation,

Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the doctrine of *res judicata* applies to bar a California suit by an individual shareholder where (A) a final order and judgment was entered upon the court-approved settlement of prior pending Delaware class actions, (B) the cause of action alleged in the California complaint is fully encompassed by the Delaware class action claims and (C) the California plaintiff was a member of the plaintiff class as certified in the Delaware actions, received due and adequate notice of his status and its effect on his California action, was afforded an opportunity to be heard and to participate, and accepted the settlement by tendering his shares in conformance with its terms.

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BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Respondents Martin Stone, Harvey L. Karp and George H. Levine (hereinafter collectively "respondents") submit this brief in opposition to petitioner Charles Terry's petition for a writ of certiorari to review the decision of the Court of Appeal of the State of California, Second Appellate District, filed on July 9, 1985, affirming the dismissal of this action by the Superior Court of the State of California, County of Los Angeles, as barred by the doctrine of *res judicata*.[1]

1 The caption of this case in this Court contains the names of all parties to this proceeding.

Respondents oppose Terry's petition on the grounds that the California Court of Appeal correctly decided that the *res judicata* effect of the final order and judgment entered after a court-approved settlement of prior pending Delaware class actions, which "dealt precisely with the issues raised in [Terry's] complaint," and which Terry, a member of the plaintiff class, "accepted . . . by tendering his shares in conformance therewith," barred Terry's California action.

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, Second Appellate District, is unreported and appears in Appendix A to the Petition.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1275(3).

STATUTES INVOLVED

The provisions of the United States Constitution at issue on this petition for a writ of certiorari are the due process clause of the Fourteenth Amendment, section 1, U.S. Const. amend. XIV, § 1 and the Full Faith and Credit Clause of Article IV, section 1, U.S. Const., art. IV, § 1.

STATEMENT OF THE CASE

A. Terry's California Complaint

Charles Terry filed an action in the Los Angeles Superior Court on February 17, 1983 against Monogram Industries, Inc. ("Monogram"), a Delaware corporation, and against Messrs. Stone, Karp and Levine, as officers of that corporation. (Complaint, Respondents' Appendix 1).[2] Terry's complaint contained a single cause of action for breach of fiduciary duty. The complaint alleged that respondents Stone, Karp and Levine, who owned collectively approximately 30% of the outstanding stock of Monogram, breached fiduciary duties allegedly owed to Terry, as a Monogram shareholder, by selling their Monogram Stock to Nortek, Inc. ("Nortek") for a price in excess of the price at which Monogram stock was then trading on the New York Stock Exchange. (Complaint at ¶¶ 7-8, R.A. 1 at 2). Terry sought as compensatory damages a *pro rata* participation in the premium amount paid by Nortek to respondents for their controlling interest, as well as punitive damages in an unspecified amount. (Complaint at ¶ 11, R.A. 1 at 3).

B. The Prior Pending Delaware Actions

At the time Terry filed his action, there were two suits pending in the Court of Chancery of the State of Delaware against respondents, Monogram and others, which also challenged respondents' sale of their block of Monogram stock to Nortek: *Nussbacher v. Stone*, No. 7051 (Del. Ch. filed Dec. 27, 1982) and *Abramson v. Stone*, No. 7068 (Del. Ch. filed Jan. 12, 1983). (Del. Complaint, R.A. 2). The named plaintiffs in these actions were each shareholders of Monogram and asserted derivative claims on behalf of Monogram (Count III) and class claims on behalf of all owners of Monogram com-

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2 Respondents' Appendices are found at the back of this brief and references thereto appear as "R.A."

mon stock (Counts I and II). These actions sought primarily equitable relief to enjoin or rescind the sale of respondents' block of Monogram stock to Nortek, to compel divestiture by Nortek of the stock and to assure that all public stockholders received a *pro rata* share of all consideration paid by Nortek for the Monogram stock. (Del. Complaint at ¶ B, R.A. 2 at 19).

C. The Stay of the California Action

On the basis of the prior pending Delaware actions, respondents brought a motion in the Los Angeles Superior Court to dismiss or stay Terry's action on the ground, *inter alia*, of *forum non conveniens*. (Salomon Aff., R.A. 3). By this motion, respondents informed both Terry and the Superior Court that Terry was a member of the plaintiff class in the Delaware actions; those Delaware actions asserted the same breach of fiduciary duty claim against respondents arising out of their sale of Monogram stock to Nortek as Terry asserted in his complaint; and if the plaintiff class prevailed in the Delaware suits, then Terry would be accorded complete relief. (Salomon Aff. at ¶¶ 6-7, R.A. 3 at 21-22). This motion was granted on May 16, 1983 by the Superior Court in a Minute Order issuing a stay pending a "change in circumstances." (Minute Order, R.A. 4).[3]

Terry moved to vacate the stay shortly after it was granted. In papers submitted in opposition to vacatur, respondents once again advised Terry and the Court that Terry was a member of the plaintiff class in the Delaware actions, which, when resolved, would afford Terry all appropriate relief. (Salomon Aff. at 4-5, R.A. 5 at 25). Terry was also informed that he would soon be served with an Order of the Delaware Vice Chancellor directing him as a member of the Delaware plaintiff class to cease prosecution of his California action pending final determination of whether a proposed settlement in the

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3 The Court also granted respondent Levine's motion to quash the service upon him for lack of personal jurisdiction.

Delaware actions should be approved by the Delaware Court. (Salomon Aff. at 3-5, R.A. 6 at 27-28).

D. Notice of Pendency of Class Action and Settlement

On or about July 15, 1983, all Monogram shareholders of record, including Terry, were sent a "Notice of Pendency of Class and Derivative Actions, Class Action Determination, Settlement, Settlement Hearing and Right to Appear" (the "Notice") (R.A. 7), along with a joint proxy statement (the "Proxy Statement") (R.A. 8) containing, as exhibits, a Stipulation of Settlement (R.A. 9) and a copy of the order of the Delaware Vice Chancellor, signed on July 15, 1983 (the "Order") (R.A. 10), referenced above. The Notice and Proxy Statement included descriptions of the nature of the claims asserted in the Delaware actions, the plaintiff class of Monogram shareholders certified by the Chancery Court and the settlement terms. (Notice, R.A. 7; Proxy Statement at 53-55, R.A. 8 at 39-45). The Order expressly provided that the class action claims were to be maintained pursuant to Delaware Chancery Court Rule 23(a) and (b)(2), which are identical to the corresponding rules of the Federal Rules of Civil Procedure, applicable to class action claims brought primarily for injunctive, declaratory or other equitable relief. (Order at ¶ 1, R.A. 10 at 53-54).

The Notice expressly states that the proposed settlement "will be binding . . . upon all members of the Class with respect to the class action claims," and that the final judgment to be entered upon court approval of the proposed settlement will dismiss with prejudice "all claims which were or could have been asserted against any defendant . . . arising out of the [Delaware actions] or the matters referred to in the [Delaware actions]." (Notice at ¶¶ 3-4, R.A. 7 at 30-31). In this regard, the accompanying Proxy Statement made specific reference to Terry's California action and stated that the defendants therein expected to move to dismiss that action if the settlement of the Delaware actions were approved. (Proxy Statement at 83, R.A. 8 at 45-46).

Finally, both the Notice and Proxy Statement specified the date, time and place of the settlement approval hearing and advised that all members of the plaintiff class had the right to attend and be heard at that hearing. (Notice at ¶ 4, R.A. 7 at 31; Proxy Statement at 54-55, R.A. 8 at 39-45).[4]

E. The Final Order and Judgment of the Delaware Court

Following the notice and hearing, the Delaware actions were settled with Court approval, and a final order and judgment was entered on August 25, 1983 (the "Judgment") (R.A. 11). The Judgment provided for the dismissal with prejudice of all claims that were, or that could have been, asserted in the Delaware actions on the following basis:

1. The settlement, which paid the class members an increased price per share for the sale of their Monogram shares to Nortek, was determined to be fair, reasonable and in the best interest of the plaintiff class of Monogram shareholders (Judgment at ¶ 3, R.A. 11 at 55);

2. Due and adequate notice of the class action and the settlement hearing had been given to the Monogram shareholders, and full opportunity to be heard had been provided (Judgment at ¶¶ 1 and 2, R.A. 11 at 55);

3. Dismissal of the Delaware actions on the merits as to all defendants (including respondents herein) with prejudice was ordered (Judgment at ¶ 4, R.A. 11 at 55-56); and

4. A permanent bar and injunction was entered against the institution or prosecution by the plaintiffs, or any member of the plaintiff class, of claims against the defendants therein arising out of respondents' sale of Monogram stock to Nortek "or any other matters, transactions or occurrences comprising the subject matter of the consolidated Actions, including all matters which were alleged or which could have been alleged in the [Delaware actions]." (Judgment at ¶ 5, R.A. 11 at 56).

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4 The Proxy Statement also contained a full description of the appraisal rights then available to Terry as a Monogram shareholder. (Proxy Statement at 47-49, R.A. 8 at 35-39).

F. Dismissal of the California Action

Based on this final disposition of the Delaware actions, respondents successfully demurred to Terry's complaint and the action was dismissed by the California Superior Court on July 2, 1984, as barred by the doctrine of *res judicata*. (Order, R.A. 12).

G. Appeal of the Stay and Dismissal Orders

Terry appealed both the stay order of May 16, 1983 and the dismissal order of July 2, 1984. The California Court of Appeal issued a memorandum opinion on July 9, 1985, dismissing the stay appeal as moot and affirming the order of dismissal. (Opinion, Petitioner's Appendix ("P.A.") A).[5] The Court of Appeal specifically rejected Terry's contentions, raised here, that "the Delaware judgment in certain particulars did not fully encompass the claims set out in his complaint, so as to be inadequate to prevent his further prosecution of those claims, or was invalid as to him as a purported member of the class to which it related." (Opinion at 6-7, P.A. A). In this regard, the Court of Appeal stated:

> [T]he record discloses not only that the Delaware judgment dealt precisely with the issues raised in appellant's complaint, but that *appellant accepted the terms of the settlement by tendering his Monogram shares in conformance therewith*, thereby precluding any claim the judgment was not binding upon him.

(Opinion at 8-9, P.A. A) (footnote omitted; emphasis added). The Court further noted that Terry's "insistence he should be able to continue to seek punitive damages because such were not part of the settlement is, of course, at odds with fundamental principles associated with the doctrine of res judicata." (Opinion at 8-9 n.5, P.A. A) (citations omitted).

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5 Terry had also appealed the dismissal of claims against respondent Levine but the Court of Appeal did not deem it necessary to rule upon that issue. (Opinion at 4 n.2, P.A. A).

H. Petition to the California Supreme Court

Petitioner next filed a petition for review of the Court of Appeal's decision in the Supreme Court of California. His brief in support of that appeal is virtually identical to his petition for a writ of certiorari to this Court. The California Supreme Court denied Terry's petition for review on October 16, 1985. (Order, P.A. B).

REASONS FOR DENYING THE WRIT

The California Court of Appeal correctly held that under the principles of *res judicata*, the Delaware final order and judgment was binding on the California action involving identical claims and parties.[6] As this Court has recognized, "under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979). *See also Perez v. City of San Bruno*, 27 Cal. 3d 875, 616 P.2d 1287, 1290, 168 Cal. Rptr. 114 (1980) (*en banc*) (quoting *Bernhard v. Bank of America*, 19 Cal. 2d 807, 810, 122 P.2d 892, 894 (1942)) (*res judicata* " 'precludes parties or their privies from relitigating a cause of action that has been finally determined by a court of competent jurisdiction' "). Petitioner cannot escape the mandate of this rule by citing to purely formalistic or "technical" distinctions between the two cases or by denying his participation in the Delaware class actions in the face of ample notice of his membership in the plaintiff class, opportunity to be heard, and his acceptance of the settlement terms by conformance therewith. Petitioner's attempt to relitigate in California the same cause of action adjudicated to final judgment in the

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6 While petitioner has failed to specify the particular provision of Rule 17.1 of the Supreme Court Rules under which his petition is brought, a fair reading of his papers suggests that it is purportedly brought under Rule 17.1(c) on the grounds that a state court has decided a federal question in conflict with applicable decisions of this Court. As demonstrated herein, petitioner is wrong.

Delaware class actions was properly rejected by the California Court of Appeal.

A. THE CAUSE OF ACTION ALLEGED IN THE CALIFORNIA COMPLAINT IS ENCOMPASSED BY THE DELAWARE CLASS ACTION CLAIMS.

The California complaint presents the same issue based on the same cause of action as the Delaware class action claims. Both cases seek to redress injury allegedly resulting from respondents' sale of their controlling block of Monogram stock to Nortek at a premium price. Under these circumstances, the *res judicata* effect on the California action of a final judgment in the Delaware actions is not disturbed by differences in the form of the actions or the remedies sought.

The determination of whether the same cause of action is involved in two lawsuits for *res judicata* purposes may be articulated in different ways, but essentially courts look to the substantive nature of the harm suffered or the transaction at issue, as opposed to the particular facts alleged or the legal theories advanced. The California courts adhere to the "primary rights" theory, which recognizes only a single cause of action for the invasion of a primary right. *Slater v. Blackwood*, 15 Cal. 3d 791, 795, 543 P.2d 593, 594-95, 126 Cal. Rptr. 225, 227 (1975) (*en banc*) ("[O]ne injury gives rise to only one claim for relief. 'Hence a judgment for the defendant is a bar to a subsequent action by the plaintiff based on the same injury. . . . even though he presents a different *legal ground* for relief' ").[7] Other courts follow a "transactional" approach, under which a subsequent action will be barred if the claim asserted therein is based on the same operative facts as those adjudicated in a prior suit. *See Davis v. United States Steel*

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7 The federal courts generally look to the forum state law on *res judicata*. *See First Congregational Church & Society v. Evangelical & Reformed Church*, 305 F.2d 724, 728 (2d Cir. 1962), *cert. denied*, 372 U.S. 918 (1963) (New York law applied in diversity action in determining *res judicata* issues).

Supply, 688 F.2d 166, 171 (3d Cir. 1982), *cert. denied*, 460 U.S. 1014 (1983); *Silcox v. United Trucking Serv., Inc.*, 687 F.2d 848, 852 (6th Cir. 1982); *Costantini v. TWA*, 681 F.2d 1199, 1201-02 & n.7 (9th Cir.), *cert. denied*, 459 U.S. 1087 (1982). This test is often articulated as whether the primary right and duty or wrong are the same in each case. *See Ray v. Tennessee Valley Authority*, 677 F.2d 818, 821 (11th Cir. 1982), *cert. denied*, 459 U.S. 1147 (1983); *White v. World Finance of Meridian, Inc.*, 653 F.2d 147, 150 (5th Cir. 1981); *Nash County Board of Education v. Biltmore Co.*, 640 F.2d 484, 487-88 (4th Cir.), *cert. denied*, 454 U.S. 878 (1981). Under any of these formulations, therefore, different theories of recovery or remedies sought do not constitute different causes of action for purposes of determining whether a claim in a second lawsuit is barred under principles of *res judicata* by the adjudication of a claim in a prior action.

Res judicata also operates to bind parties to the prior suit in which a final judgment has been entered not only as to every matter that was actually offered and received to sustain or defeat the causes of action stated in the prior action, but also as to any other admissible matter that might have been offered in the prior action. *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) ("A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action"); *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 578-79 (1974); *Olwell v. Hopkins*, 28 Cal. 2d 147, 168 P.2d 972, 975 (1946); *Boccardo v. Safeway Stores, Inc.*, 134 Cal. App. 3d 1037, 184 Cal. Rptr. 903, 907-08 (1982). This rule prevents the splitting of a cause of action in order to secure a second or greater recovery. *See Ford Motor Co. v. Superior Court*, 35 Cal. App. 3d 676, 110 Cal. Rptr. 59, 61 (1973); *City of Los Angeles v. Superior Court*, 85 Cal. App. 3d 143, 149 Cal. Rptr. 320, 324-25 (1978).

The same alleged injury and operative facts formed the basis of the California and Delaware actions. Both Terry and the

Delaware plaintiff class alleged a single injury, namely, that had they sold their Monogram shares on the New York Stock Exchange, they would have received a lower price than the price received by respondents when they sold their controlling block of stock to Nortek. Both actions alleged that respondents breached fiduciary duties in selling their shareholdings to Nortek.

The differences between the California and Delaware actions enumerated by petitioner have no bearing on the *res judicata* determination and do not detract in any respect from the essential identity of the causes of action asserted in each. The only differences identified in the Petition are: (1) the Delaware actions are brought as a derivative and class action, while the California action is brought on behalf of an individual shareholder; (2) the Delaware actions seek primarily equitable relief and the California action only damages; and (3) the Delaware actions do not seek punitive damages as does the California action. (Petition at 17). These constitute only differences in the form of the action (No. 1) and the relief sought (Nos. 2 and 3); they do not represent substantive differences in the nature of the harm suffered or the transaction at issue, therefore leaving untouched the application of *res judicata* under the authorities discussed above. The fact that the Delaware action is styled as a derivative and class action does not mean that the claims asserted are inherently different from the cause of action alleged by Terry. There is nothing *sui generis*, unusual or particular about the claim Terry alleged as a Monogram shareholder that distinguished it from the claims asserted on behalf of all Monogram shareholders in the Delaware class actions.

Furthermore, the relief sought in the two actions is not fundamentally different. The Delaware actions included a request for compensatory damages. In addition, the specific equitable relief sought and obtained by final judgment through the Delaware settlement paid the plaintiff class members, including Terry, an increased price per share for the sale of their Monogram shares to Nortek. This is essentially the same relief Terry sought as compensatory damages.

The fact that the Delaware actions do not include a claim for punitive damages is also not determinative of their *res judicata* effect on the California action. Even if the Delaware actions fail to encompass each and every claim raised in the California action, *res judicata* would still apply because it binds parties not only as to claims raised but as to those that could have been raised. *Boccardo v. Safeway Stores, Inc.*, 134 Cal. App. 3d 1037, 184 Cal. Rptr. at 907-08 (1982). Since the Delaware class actions could have requested punitive damages, Terry is precluded now from relitigating the issue of punitive damages in the California action. This result insures that Terry cannot split his cause of action in the hope of obtaining a second or additional recovery for the same injury. *See Ford Motor Co. v. Superior Court*, 35 Cal. App. 3d 676, 110 Cal. Rptr. at 61 (1973).

B. TERRY WAS A MEMBER OF THE DELAWARE PLAINTIFF CLASS AND RECEIVED FULL DUE PROCESS PROTECTION IN THAT ACTION.

The plaintiff class certified in the Delaware actions was composed of all Monogram shareholders as of a record date. Terry does not dispute that he met that criterion for membership and that he received due and adequate notice of his status, its effect on his California action and an opportunity to be heard. Instead, while accepting the benefits of the final judgment entered in Delaware, he seeks to divorce himself from the binding effect of that judgment by claiming that the Delaware court's exercise of jurisdiction over him constitutes a violation of due process. To support this contention, he now claims that: (1) he never appeared in the Delaware action or consented to the judgment entered therein; (2) he was never given an opportunity to "opt out" or remove himself from the plaintiff class; (3) he was inadequately represented in the Delaware actions; and (4) the "unlitigated" settlement does not constitute a final and binding judgment. As demonstrated below, these arguments do not defeat the Delaware court's exercise of jurisdiction over Terry or the *res judicata* effect of its judgment on his California action.

1. The Delaware Court Had Jurisdiction Over Terry As A Member Of The Plaintiff Class.

Neither the absence of petitioner Terry from the state of Delaware nor his lack of contact with that state is a bar to the Delaware court's exercise of jurisdiction over Terry as a member of the plaintiff class in the Delaware class actions. As this Court recently held, "a forum State may exercise jurisdiction over the claim of an absent class-action plaintiff, even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant." *Phillips Petroleum Co. v. Shutts*, ___ U.S. ___, 105 S. Ct. 2965, 2975 (1985). *See also Hansberry v. Lee*, 311 U.S. 32, 41 (1940) (a class action binds not only the representative parties but also all non-participating members of the class); *Penson v. Terminal Transport Co.*, 634 F.2d 989, 992 (5th Cir. 1981) ("[a] judgment or court-approved settlement entered in a properly certified class action generally will bind an absent class member"); *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239, 248-49 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975).

Nor is jurisdiction defeated in this case because Terry was not given a chance to opt out of the plaintiff class. The Delaware plaintiff class was certified under Rule 23(b)(2) of the Delaware Chancery Court Rules, which is identical to Rule 23(b)(2) of the Federal Rules of Civil Procedure, applicable to class actions brought primarily for equitable relief. It is explicit in these rules and widely accepted among the federal circuit courts that a member of a class certified under Rule 23(b)(2) has no absolute right to opt out of the class; only members of a Rule 23(b)(3) class, applicable to actions brought primarily for monetary relief, are required to be given such opt out rights. *Penson v. Terminal Transport Co.*, 634 F.2d at 993; *Dosier v. Miami Valley Broadcasting Corp.*, 656 F.2d 1295, 1299 (9th Cir. 1981); *Walsh v. Great Atlantic & Pacific Tea Co.*, 726 F.2d 956 (3d Cir. 1983); *Ives v. W.T. Grant Co.*, 552 F.2d 749, 764 (2d Cir. 1975). *See also* 7A C. Wright & A. Miller, *Federal Practice and Procedure* § 1786, at 144 (1972); 3B J. Moore,

Moore's Federal Practice ¶ 23.55 at 23-440 to 23-442 and 23-462 to 23-463 (2d ed. 1985). As one court explained:

> The theory underlying the less stringent notice requirements for Rule 23(b)(2) actions is that there is purportedly a greater degree of "cohesiveness or unity in the class" than in 23(b)(3) actions, which minimizes the need for notice and a right to opt out of the class. *See* Advisory Committee Notes, 39 F.R.D. at 106. *See also Johnson v. General Motors Corp.*, 598 F.2d 432, 437-38 (5th Cir. 1979). This cohesiveness is claimed to result from both the group nature of the harm alleged and the broad character of the relief sought. *See* Note, 88 Yale L.J. at 872-73.

Penson v. Terminal Transport Co., 634 F.2d at 993-94.

The only case relied on by petitioner in support of an opt out right is this Court's decision in *Phillips Petroleum Co. v. Shutts*. (Petition at 18). The holding of that case regarding the provision of opt out notice and opportunity, quoted by petitioner, is expressly limited, however, to "class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments," as opposed to class actions, such as the Delaware actions, seeking equitable relief. 105 S. Ct. at 2975 n.3. Thus, there is no support for petitioner's claim that he was deprived of due process in that he did not have an opportunity to remove himself from the class.

2. Petitioner Cites No Basis For His Contention That He Was Not Adequately Represented In The Delaware Actions.

Petitioner's conclusory assertion that he was inadequately represented in the Delaware actions is entirely unsupported even by contended, much less proven, facts. There is no allegation of bias, conflict of interest, or incompetence with respect to either the Delaware class representatives or the attorneys in the Delaware actions. Petitioner alludes to no facts that would suggest the existence of any of these factors. Most significantly, neither petitioner nor his lawyer raised any

objection to the class representation at the settlement hearing. Instead, petitioner concedes that he accepted the settlement terms by tendering his Monogram shares.[8] As the California Court of Appeal held, this conduct entirely undercuts petitioner's claim that he was not afforded adequate representation in the Delaware class actions. (Opinion at 9, P.A. A).

3. The Delaware Judgment Is Entitled To Full Faith And Credit By The California Court.

The fact that the Delaware judgment was based on a stipulated settlement rather than a trial on the merits does not deprive it of "full faith and credit" in every other state. Under the Full Faith and Credit clause of the United States Constitution, every state is required to give a judgment at least the *res judicata* effect that the judgment would be accorded in the state that rendered it. *Underwriters National Assurance Co. v. North Carolina Life & Accident & Health Insurance Guaranty Assn.*, 455 U.S. 691, 703-04 (1982); *Durfee v. Duke*, 375 U.S. 106, 109 (1963). The parties to a stipulated or consent judgment are bound by that judgment to the same extent as judgments rendered upon controverted facts and due consideration thereof in a contested trial; such a consent judgment is entitled to *res judicata* effect to preclude duplicative litigation. *Bilderback v. City National Bank & Trust Co.*, 639 F.2d 331, 332 (6th Cir. 1981) (judgment entered as a consent decree in a state court class action precluded a second action in federal court); *Laskey v. International Union, UAW*, 638 F.2d 954 (6th Cir. 1981); *Robertson v. National Basketball Association*, 622 F.2d 34 (2d Cir. 1980); *Berry Petroleum Co. v. Adams & Peck*, 518 F.2d 402, 412-13 (2d Cir. 1975); *TBK Partners, Ltd. v. Western Union Corp.*, 517 F. Supp. 380, 388 (S.D.N.Y. 1981), *aff'd*, 675 F.2d 456 (2d Cir. 1982) (settlement of consolidated class and derivative actions forecloses pending state court actions arising out of the same subject matter); *see also Maher*

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8 Nor did Terry seek alternative recourse by exercise of his appraisal rights.

v. Zapata Corp., 714 F.2d 436, 459-60 (5th Cir. 1983) (settlement of a derivative claim which is embodied in a judgment has the typical *res judicata* effect as any judgment); *Maldonado v. Flynn*, 573 F. Supp. 684 (S.D.N.Y. 1983) (claims advanced in one derivative action were precluded by *res judicata* by the settlement of similar derivative action in case in another state).

The cases relied on by the petitioner on this issue (Petition at 22-23) do not hold to the contrary. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 750 (1975) holds only that those who are not parties to a consent decree are not bound by it. In that case, unlike here, the persons against whom the consent decree was sought to be imposed were not parties to the action in which it was enforced. *Id.* at 725 n.1. Similarly, *United States v. International Building Co.*, 345 U.S. 502 (1953) concerned the collateral estoppel effect of a consent decree in a second action between the same parties, but upon a different claim or demand. Although the consent decree was accorded no collateral estoppel effect in a second action on a different claim, the court expressly recognized that judgments entered pursuant to a consent decree were *res judicata* and an absolute bar to a subsequent action on the same claims, "whether or not the basis of the agreements on which they rest reached the merits." 345 U.S. at 506.

Moreover, the judgment to which petitioner consented as a member of the Delaware plaintiff class expressly provided that Monogram shareholders are permanently barred and enjoined from prosecuting any lawsuit against respondents based on their sale of Monogram stock to Nortek. Petitioner was specifically notified that this would lead to the dismissal of his California action. (*See* Proxy Statement at 83, R.A. 8 at 45-46). Instead of objecting to the settlement or seeking to exercise his appraisal rights, petitioner admits that he accepted the settlement by tendering his Monogram stock in conformity therewith. (Petition at 20-21). As the California Court of Appeal held, this conduct alone precludes relief based upon any claim on Terry's part that he was not bound by the judgment.

CONCLUSION

For the reasons set forth above, respondents Martin Stone, Harvey L. Karp and George H. Levine respectfully request that this Court deny the instant petition for a writ of certiorari to the Court of Appeal of the State of California, Second Appellate District, on the ground that that Court correctly affirmed the dismissal of this action as barred by the doctrine of *res judicata*.

Dated: February 13, 1986
New York, New York

Respectfully submitted,

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RESPONDENTS' APPENDIX 1

TERRY v. STONE, et al.

COMPLAINT

Filed February 17, 1983

[Caption Omitted]

Plaintiff alleges:

1. Plaintiff is, and at all times herein mentioned, was, a resident of the County of Los Angeles, State of California, and the holder of eight thousand shares of stock in defendant Monogram Industries, Inc.

2. Defendant Monogram Industries, Inc. (Monogram) is, and at all times herein mentioned, was, a corporation organized and existing under the laws of the State of Delaware and with its principal place of business located at 1299 Ocean Avenue, Santa Monica, California 90401, and has qualified to do business in California.

3. Defendant Martin Stone (Stone) is, and at all times herein mentioned, was, Chairman of the Board of Directors, and Chief Executive Officer of defendant Monogram, and was the owner of approximately 11.7% (208,099 shares) of the outstanding shares of common stock of defendant Monogram.

4. Defendant Harvey L. Karp (Karp) is, and at all times herein mentioned, was, Vice-Chairman of the Board of Directors, President, and Chief Operating Officer of defendant Monogram and the owner of 10.7% (192,749 shares) of the outstanding shares of common stock of defendant Monogram.

5. Defendant George H. Levine (Levine) is, and at all times herein mentioned, was, Vice-President and Director of defendant Monogram, and the owner of 5.7% (99,500 shares) of the outstanding shares of common stock of defendant Monogram.

6. Plaintiff is unaware of the true names and capacities of the defendants sued herein as DOES I THROUGH V and is informed and believes and thereon alleges that each of such parties may be liable to plaintiff in some manner for alleged acts in the events hereinafter referred to and plaintiff will amend this complaint to show their true names and capacities when ascertained.

7. Defendants Stone, Karp, and Levine, dominate the management of defendant Monogram and together have a controlling interest of the outstanding common stock of defendant Monogram, and, as directors of defendant Monogram, have been, and still are, fiduciaries with respect to plaintiff.

8. At a time not presently known to plaintiff but known to said defendants, defendants Stone, Karp, and Levine entered into an agreement to sell all of their shares of stock to Nortek, Inc., a Rhode Island corporation, for approximately $35,400,000.00 cash, and together with an agreement including defendant Monogram for the payment by Nortek, Inc. to said defendants Stone, Karp, and Levine, of the sum of an additional $4.4 million cash to settle benefit plans provided said defendants by defendant Monogram, making a total of $40,000,000.00 cash. Plaintiff is informed and believes that the actual sale of the stock, and settlement of said benefit plans, and receipt of said total amount of $40,000,000.00, was consummated on January 31, 1983.

9. At no time did defendants Stone, Karp, Levine, or Monogram inform plaintiff of the contemplated sale of said stock to Nortek, Inc., nor at any time did said defendants offer or permit plaintiff to participate in the sale of said stock to Nortek, Inc.

10. Upon information and belief, the price of said stock under the said sales agreement with Nortek, Inc. was for approximately $75.00 per share, which was publicly announced on or about December 21, 1982. As of December 21, 1982, the common stock of Monogram was approximately $50.00 on the New York Stock Exchange.

11. Due to the actions of defendants Stone, Karp, Levine, and Monogram, and each of them, plaintiff has been damaged in not being allowed to participate in the sale (pro rata) of stock to Nortek, Inc. in the amount of at least $24.00 per share, a total of approximately $192,000.00, and in a further amount which plaintiff is unable to ascertain at this time but will ask leave of court to insert the exact amount in view of the decline of the value of Monogram's stock on the New York Stock Exchange since December 21, 1982, due to said sales agreement.

12. Defendants Stone, Karp, and Levine, have been guilty of oppression, fraud, and malice, in entering into said sales agreement with Nortek, Inc. and causing the defendant Monogram to consummate the transfer of their stock to Nortek, Inc. and have acted in conscious disregard of plaintiff's rights as a shareholder of defendant Monogram. Defendant Monogram has aided and abetted defendants Stone, Karp, and Levine in entering into and in consummating said sales agreement and said settlement of said benefit plans.

13. The acts and conduct described herein of defendants and each of them were done with a conscious disregard for plaintiff's rights and with the intent to vex, injure, or annoy plaintiff, such as to constitute oppression, fraud and malice under Civil Code § 3294, entitling plaintiff to punitive damages in an amount appropriate to punish or set an example of defendants and each of them.

WHEREFORE, plaintiff prays for judgment against defendants and each of them as follows:

1. For general and special damages in an amount according to proof at time of trial, in an amount above the jurisdictional minimum of this court.

2. For punitive and exemplary damages in an amount appropriate to punish or set an example of each of the defendants.

3. For costs of suit.

4. For other and further relief as is just and proper.

DATED: February 14, 1983

LARWILL & WOLFE and
JOHN JOSEPH HALL

By _____/s/_____
JOHN JOSEPH HALL
Attorneys for Plaintiff

RESPONDENTS' APPENDIX 2

IN THE COURT OF CHANCERY OF
THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Civil Action No. 7051

MOLLIE NUSSBACHER and ALAN ABRAMSON,
Plaintiffs,

—against—

MARTIN STONE, HARVEY L. KARP, GEORGE H. LEVINE, PHILLIP L. BALL, FREDERIC G. WORDEN, MITCHELL W. SPELLMAN, ALFRED S. GAINSLEY, RALPH R. PAPITTO, RICHARD L. BREADY, JOHN A. DODENHOFF, MONOGRAM INDUSTRIES INC. and NORTEK INC.,
Defendants.

CONSOLIDATED AMENDED AND SUPPLEMENTAL COMPLAINT

Plaintiffs, by their undersigned attorneys, for their Consolidated Amended and Supplemental Complaint allege, upon personal knowledge as to themselves and their own acts and upon information and belief as to all other matters, as follows:

Summary of the Action

1. This class and derivative action arises out of a plan and scheme by defendant Nortek Inc. ("Nortek") to acquire 100% of the outstanding common stock of defendant Monogram Industries, Inc. ("Monogram" or the "Corporation") by inducing defendants Stone, Karp and Levine (collectively, the "Selling Defendants") who, until recently, dominated Monogram management and its Board of Directors, to sell to Nortek their corporate offices, directorships and Monogram share-

holdings. Nortek has thus immobilized the Monogram management and is in a position to dictate the terms of its planned acquisition of the remaining stock of Monogram owned by public shareholders.

The Parties

2. Plaintiff Mollie Nussbacher has owned shares of common stock of defendant Monogram for several years and at the time of the transactions complained of herein; plaintiff Alan Abramson is a member of the class on whose behalf this action is brought.

3. Monogram is a Delaware corporation with its principal place of business in Santa Monica, California. The Corporation is engaged principally in the manufacture and sale of metal products and electrical materials, and the development of real estate. As of September 1, 1982, Monogram had 1,579,502 shares of common stock outstanding, which shares are traded on the New York Stock Exchange and several regional exchanges. As of that same date, Monogram also had 82,530 shares of Series A, $3.25 Cumulative Convertible Preferred stock outstanding.

4. The Selling Defendants are officers and, until January 31, 1983, were directors and the largest stockholders of Monogram. Their positions with the Corporation and beneficial shareholdings (as of September 1, 1982) were reported in Monogram's most recent Proxy Statement to be as follows:

Person	*Position*	*Stock Ownership*
Martin Stone	Chairman of the Board and Chief Executive Officer	208,099 (11.7%)
Harvey L. Karp	Vice Chairman of the Board, President and Chief Operating Officer	192,749 (10.7%)
George H. Levine	Vice President and Director	99,500 (5.7%)

5. The Selling Defendants are the three highest paid employees of Monogram. For the fiscal year ended June 30, 1982, the Selling Defendants received the following compensation from Monogram:

Person	*Salaries, Fees, Directors' Fees, Commissions and Bonuses*	*Securities or Property, Insurance Benefits or Reimbursement, Personal Benefits*	*Aggregate of Contingent Forms of Remuneration*
Martin Stone	$369,885	$2,667	$ 36,385
Harvey L. Karp	357,462	2,667	63,256
George Levine	343,446	—	13,076

6. The Selling Defendants controlled the nomination and election of directors to the Monogram Board. For example, Jacqueline Brandwynne-Cotsen, who resigned from Monogram's Board on January 25, 1983, was elected to the Monogram Board because of her long association with defendant Karp. Similarly, defendant Spellman was nominated and elected to the Board solely because of his acquaintance with defendant Stone, another of the Selling Defendants.

7. Defendant Ball, an officer and director of Monogram, is also one of the Corporation's highest paid employees. For the fiscal year ended June 30, 1982, Ball received aggregate remuneration from Monogram of $127,008. In addition, Ball receives $4,000 per year for representing Monogram on the Board of Directors of Craig Corporation, a Monogram corporate affiliate. Ball is beholden to the Selling Defendants, who promoted him to his positions of prominence within Monogram.

8. Defendants Gainsley, Worden and Spellman are, and at all times relevant hereto were, directors of Monogram. These individuals are well-compensated by Monogram for their services and owe their positions and perquisites directly to the Selling Defendants.

9. Defendant Gainsley, an attorney engaged in private practice, receives a yearly retainer of $2,400 from the Corporation.

The directors of Monogram who are not employees of the Corporation or its subsidiaries (including defendants Gainsley, Worden and Spellman) receive a fee of $8,000 per year and a fee for attendance at meetings of the Board at the rate of $1,000 per meeting for each meeting (other than telephonic meetings) that they attend. Members of the Audit Committee (Gainsley and, until her resignation, Brandwynne-Cotsen) and Compensation Committee (Gainsley, Spellman and Worden) receive additional compensation of $1,500 per annum. Gainsley, as Chairman of the Audit and Compensation Committees, receives an additional $400 per year for chairing these committees.

10. Defendant Nortek is a Rhode Island corporation with its principal place of business in Cranston, Rhode Island. Nortek manufactures construction materials and rotary-drill pipe and provides dyeing and printing services. As of April 30, 1982, Nortek had 6,599,040 shares of common stock outstanding, which shares are traded on the New York Stock Exchange.

11. Defendants Ralph R. Papitto, Richard L. Brady and John A. Dodenhoff are Chairman of the Board and Chief Executive Officer; President and Chief Operating and Financial Officer; and a Director, respectively, of Nortek (collectively, the "Nortek Designees"). As explained in paragraph 24 *supra*, the Nortek Designees were elected to the Monogram Board on January 31, 1983.

The Unlawful Scheme

12. Some time prior to December 21, 1982, Nortek's management decided to acquire for Nortek all the issued and outstanding shares of Monogram for a consideration of approximately $100 million, including expenses. To initiate its acquisition effort, Nortek contacted the Selling Defendants and advised them of Nortek's desire to acquire shares of Monogram.

13. Prior to the receipt of the first overture from Nortek, the Selling Defendants had been approached by at least one

other publicly held corporation that was interested in acquiring Monogram shares. In order to maximize the price they received for their shares, the Selling Defendants, subsequent to the expression of interest by Nortek, instituted a bidding procedure whereby each bidder was to submit its bid for the sellers' shares by December 15, 1982, an arbitrarily imposed deadline.

14. The Selling Defendants recognized that they could not obtain as huge a premium for their shares if they attempted to find a purchaser for all the outstanding shares of Monogram. Accordingly, in disregard of their fiduciary duties, the bidding was limited solely to the shares owned by the Selling Defendants. The Selling Defendants totally refrained from making any attempts to negotiate the sale of all of Monogram's outstanding common stock.

15. The potential bidder other than Nortek asked for an extension of the December 15 deadline. That request was refused by the Selling Defendants, who then proceeded to finalize the Agreement with Nortek.

16. In their negotiations with Nortek, the Selling Defendants became aware that Nortek intended to acquire all the equity interest in Monogram. Nonetheless, the Selling Defendants made no effort to negotiate a fair distribution of the total consideration between themselves and Monogram's public stockholders. To the contrary, the Selling Defendants insisted upon obtaining for themselves a disproportionate share of the total consideration flowing from Nortek's acquisition of Monogram. Because they believed that they could ultimately short change the remaining stockholders of Monogram, who own approximately 70% of the outstanding shares, Nortek's management acquiesced in the Selling Defendants' exorbitant demands.

17. On December 21, 1982, the Selling Defendants and Nortek entered into an agreement (the "Agreement") pursuant to which the Selling Defendants (including persons and entities within their control) sold 477,908 shares of Monogram's outstanding stock, including 165,060 shares to be issued upon

conversion of preferred stock held by certain of the sellers, to Nortek for the following consideration: (i) $74 per share, an aggregate sum of $35,365,192; (ii) payments to Karp and Stone of $770,000 and $430,000, respectively, in lieu of indemnification by Nortek; and (iii) payments to Karp and Stone aggregating $3,185,936, purportedly to compensate them for granting options to Monogram to settle certain stock option and deferred compensation rights to which Karp and Stone are supposedly entitled. The total consideration that Nortek has paid the Selling Defendants thus exceeds $83 per share, a premium of more than 61 percent over the $51.50 per share closing price of Monogram common stock on December 20, 1982.

18. An express condition of the Agreement was that the Selling Defendants resign as directors of Monogram, effective upon the closing, and be replaced by three representatives designated in writing by Nortek.

19. Under Monogram's By-Laws, the continuing directors of the Corporation are empowered to fill any vacancies on the Board of Directors created by the resignation of a director. At the time Nortek and the Selling Defendants entered into the Agreement they also entered into an agreement or understanding between them that the closing of the transaction would be preceded by a vote of the continuing Monogram directors (defendants Ball, Worden, Spellman and Gainsley, and Brandwynne-Cotsen, who resigned as a Monogram director on January 25, 1983) approving the election of the three Nortek designees to succeed the Selling Defendants as directors of Monogram.

20. On or about December 21, 1982, Nortek publicly stated that it intended to propose a merger or other business combination with Monogram at some future date upon some unspecified terms, but made clear that plaintiffs and the other members of the class would receive a substantially lower price than that given to the Selling Defendants.

21. On December 28, 1983, the directors of Monogram (other than defendant Levine) attended a special meeting of the Board of Directors to discuss the Agreement (the "Special Meeting"). During that meeting, the directors discussed the terms of the Agreement, the bidding procedure utilized in connection therewith and the fact that another publicly traded company, in addition to Nortek, had expressed an interest in acquiring shares of Monogram.

22. Although Nortek had neither an equity interest nor Monogram Board representation as of the date of the Special Meeting, the Selling Defendants invited defendants Papitto and Bready (Chairman of the Board and Chief Executive Officer; and President and Chief Operating Officer, of Nortek, respectively) to attend a portion of the Special Meeting. At the Special Meeting, defendants Papitto and Bready were specifically asked about their plans and intentions for the acquisition of the remaining shares of Monogram. However, the Nortek officials were evasive as to Nortek's future plans. Effective inquiry of the Nortek representatives was further inhibited by the refusal of the Selling Defendants and defendant Ball to permit director Brandwynne-Cotsen to have her own counsel present during the Special Meeting.

23. Either at the Special Meeting or shortly thereafter, one of the directors of Monogram requested that an investment banking firm be retained on behalf of the Board to advise them in connection with the Agreement. This proposal was vetoed by the Selling Defendants and defendant Ball.

24. The closing of the Agreement was held on January 31, 1983. The Selling Defendants resigned as directors of Monogram, effective as of the closing. By a prearranged vote, the remaining Monogram directors—defendants Ball, Worden, Spellman and Gainsley (the "Remaining Directors")—cooperated in the implementation of the Agreement by electing the Nortek Designees to the Monogram Board.

25. The Remaining Directors cooperated in the implementation of the Agreement notwithstanding their knowledge of (i)

Nortek's publicly announced intention to acquire the publicly held Monogram stock at a price substantially lower than that paid to the Selling Defendants; (ii) the existence of at least one other potential bidder for the Corporation; and (iii) the evasive answers given by defendants Papitto and Bready at the Special Meeting concerning Nortek's future plans with respect to Monogram.

26. Prior to electing the Nortek Designees to Monogram's Board, the Remaining Directors made no effort, among other things, to (i) negotiate fair terms for Nortek's acquisition of the publicly held Monogram stock in the eventual merger; (ii) determine whether the other corporation that desired to acquire shares of Monogram was prepared to bid for all of Monogram's outstanding common stock; (iii) obtain investment banking advice; or (iv) assure, in any other manner, that the eventual merger terms would be fair to Monogram's public stockholders. Specifically, the Remaining Directors made no effort to ascertain what Nortek was willing to pay for 100% of Monogram or to ensure that that consideration was equitably allocated among all the Monogram shareholders.

The Proposed Merger

27. On or about March 9, 1983, Nortek publicly announced an offer to acquire the remaining shares of Monogram in exchange for some unspecified package of Nortek debt and equity. Nortek further stated that the securities offered to the Monogram stockholders would have a value of approximately $52 per share of Monogram common stock.

28. On March 31, 1983, plaintiff filed a proposed Amended Complaint charging, *inter alia*, that Nortek's exchange offer was so grossly unfair to Monogram's public stockholders that it represented palpable overreaching by Nortek. Approximately two weeks thereafter, on April 13, 1983, Nortek announced that it had raised its offer to $59 per share (the "Nortek Offer") as a result of negotiations with a committee of Monogram directors and that the Monogram Board had

agreed to the revised offer. Under the Nortek Offer, the Monogram shareholders would receive one share of Nortek common stock (presently worth approximately $12.75 per share) plus a 25-year Nortek convertible subordinated debenture (collectively the "Securities") for each Monogram share. Thus, the Nortek Offer would provide the Monogram shareholders principally with long-term debt arguably worth $59 per share, whereas the Selling Defendants received approximately $83 per share in cash.

Class Action Allegations

29. Plaintiffs bring this case on their own behalf and as a class action, pursuant to Rule 23 of the Rules of the Court of Chancery, on behalf of all holders of common stock of Monogram and their successors and assigns, other than the defendants herein, who are threatened with being forced to exchange their Monogram shares for the Securities ("the Class").

30. This case is properly maintainable as a class action in that:

(a) The Class is so numerous, consisting of at least 4,000 record holders of Monogram shares located throughout the country, that joinder of all members is impracticable;

(b) There are questions of law or fact common to the Class including, but not limited to, whether the defendants owed the Class fiduciary obligations and whether those duties have been breached by the defendants in connection with the consummation of the Agreement;

(c) Plaintiffs' claims are typical of the claims of the Class;

(d) Plaintiffs will fairly and adequately protect the interests of the Class;

(e) The prosecution of separate actions by individual members of the Class would create a risk of inconsistent and varying adjudications; and

(f) Questions of law or fact common to the members of the Class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of this controversy.

COUNT I

[Class Claim Against All Defendants Other Than Monogram and the Nortek Designees]

31. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 30 above, as if set forth fully herein.

32. Prior to January 31, 1983, the Selling Defendants, as a result of their positions as officers and directors and large stockholders; and the remaining individual defendants other than the Nortek Designees, as directors, officers and stockholders of Monogram, owed fiduciary duties to plaintiffs and the other public stockholders of Monogram.

33. All of the defendants (other than Monogram) entered into a plan and scheme to transfer control of Monogram to Nortek at substantial benefit to the Selling Defendants and at substantial prejudice to the plaintiffs and the Class, as herein alleged. As part of that plan and scheme, the Selling Defendants entered into the Agreement and sold their corporate offices and shareholdings to Nortek for approximately $40 million or $83 per share, representing a premium of more than 61% over the market price of Monogram's publicly-held shares immediately prior to the announcement of the Agreement (see paragraph 17, *supra*). The Selling Defendants thereby appropriated for themselves the lion's share of the total consideration Nortek intended to pay to acquire total ownership of Monogram.

34. The Selling Defendants, while personally benefiting themselves, have breached their fiduciary duties by failing to protect the interests of the other stockholders of Monogram.

35. The Remaining Directors breached their fiduciary duties by cooperating in the implementation of the Agreement with knowledge of Nortek's publicly announced intention to acquire the publicly held Monogram stock at a price substantially lower than that given the Selling Defendants and without taking any action (i) to negotiate fair terms for Monogram's public stockholders; (ii) to assure in any other manner that the eventual merger terms would be fair to Monogram's public stockholders; or (iii) to assure that the total consideration Nortek was willing to pay for 100% of Monogram was equitably distributed between the Selling Defendants and the public stockholders.

36. Nortek, by aiding and abetting the Selling Defendants in the breach of their fiduciary duties, is also liable to plaintiffs and the other members of the Class.

37. Plaintiffs and the Class have no adequate remedy at law.

COUNT II

[Class Claim Against All Defendants Other Than Monogram]

38. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 30 and 32 through 37 above, as if set forth fully herein.

39. As a result of the consummation of the Agreement, Nortek is now the largest stockholder of Monogram and has a dominant position on the Monogram Board of Directors. As a result, Nortek owes fiduciary duties to plaintiffs and Monogram's other public stockholders.

40. The Nortek Offer is so grossly unfair to the public stockholders of Monogram that it represents palpable overreaching, as evidenced by the following facts:

(a) The public stockholders of Monogram, who own 70% of the outstanding common stock, will receive Nortek Securities which are unlikely to be worth even $59 per

share, whereas the Selling Defendants have received approximately $83 per share in cash for their 30% interest; and

(b) Even if the Nortek Securities are in fact worth $59 per share,

(i) the proposed $59 per share price bears no relationship whatsoever to the fair value of Monogram's stock; rather, it represents the arbitrarily determined difference between the total consideration Nortek was willing to pay for Monogram and the amount the Selling Defendants appropriated for themselves; and

(ii) the proposed $59 per share price does not include the value of the derivative claim set forth in Count III hereof.

41. By selling their offices and directorships to Nortek while knowing that Nortek intended to offer a grossly unfair price to the public stockholders of Monogram, the Selling Defendants have aided and abetted Nortek in the breach of its fiduciary duties. In addition, the Selling Defendants have appropriated for themselves an unconscionable percentage of the total proceeds that Nortek has offered to pay for its acquisition of Monogram.

42. The Nortek Designees will certainly approve the proposed merger, and the Remaining Defendants have already demonstrated by their complicity in the implementation of the Agreement that they will not protect the interests of Monogram's public stockholders. Thus, unless the proposed merger is enjoined, Monogram's shareholders will be deprived of their equity interest in Monogram in a self-dealing transaction designed only to benefit Nortek and the Selling Defendants.

43. Plaintiffs and the Class have no adequate remedy at law.

COUNT III

[Derivative Claim on Behalf of Monogram]

44. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 30, 32 through 37 and 39 through 43 above, as if set forth fully herein.

45. The Selling Defendants, as a result of their positions as officers and directors and the largest stockholders of Monogram; and the Remaining Directors, as directors of the Corporation, owed fiduciary duties to Monogram.

46. Prior to December 21, 1982, the Selling Defendants conceived of a plan and scheme whereby they would enrich themselves by the sale of their Monogram corporate offices and directorships, all of which are assets of Monogram. As part of that plan and scheme, the Selling Defendants entered into the Agreement and sold their corporate offices and shareholdings to Nortek for approximately $40 million (see paragraph 17, *supra*).

47. The Selling Defendants, while personally benefiting themselves, have failed to protect the interests of Monogram. By selling assets which belong to Monogram, the Selling Defendants have also breached their fiduciary duties to Monogram.

48. The Remaining Directors aided and abetted the Selling Defendants' breach of their fiduciary duties by electing the Nortek Designees to the Monogram Board.

49. Nortek is liable to Monogram for aiding and abetting the Selling Defendants in the breach of their fiduciary duties to Monogram.

50. Plaintiffs have no adequate remedy at law.

The Reasons a Demand on the Directors of Monogram Would Be Futile

51. Plaintiffs have not made a demand upon Monogram's Board of Directors concerning the matters alleged in Count III, *supra*, because such a demand would be futile. At the time this action was commenced on December 27, 1982, the Board of Directors of Monogram was composed of the following eight individuals:

(a) the three Selling Defendants, who dominated and controlled the affairs of Monogram and its Board for many years;

(b) Defendant Ball, one of Monogram's highest paid officers, who owes his positions and perquisites directly to the Selling Defendants (see paragraph 7, *supra*); and

(c) Brandwynne-Cotsen (who resigned from Monogram's Board on January 25, 1983) and defendants Worden, Spellman and Gainsley, all of whom have served on the Monogram Board at the behest and pleasure of the Selling Defendants, and who enjoy the substantial financial benefits described in paragraph 9, *supra*.

52. The Selling Defendants were so confident of their control and domination of the Board of Directors of Monogram that they expressly conditioned the entire Agreement [including the huge premium (see paragraph 17, *supra*) the Selling Defendants received for their interests in Monogram] upon the sellers' ability to induce their fellow Monogram directors to elect the Nortek Designees as directors of Monogram. This domination was manifested when defendants Ball, Worden, Spellman and Gainsley did in fact elect the Nortek Designees to replace the Selling Defendants as directors of Monogram.

53. As a result of the sale by the Selling Defendants of their offices and shareholdings to Nortek and the active participation by defendants Ball, Worden, Spellman and Gainsley in the consummation of that unlawful transaction, all of the directors of Monogram who were directors at the time this action was

commenced (but one, Brandwynne-Cotsen) have breached their fiduciary duties to Monogram and its public stockholders and have been named as defendants in this lawsuit. These defendants certainly will not commence legal action against themselves.

54. Since January 31, 1983 the three Nortek Designees have been members of the Monogram Board of Directors. All three of these individuals are Executive Officers and/or Directors of Nortek. They were elected to the Board of Monogram solely because they were designated by defendant Nortek, are therefore completely beholden to Nortek, and certainly will not take any action contrary to Nortek's financial interest. In addition, they have participated in the unlawful scheme and have been named as defendants in this action. Accordingly, the Nortek Designees also cannot be expected to commence legal action to obtain redress for the wrongs alleged herein.

WHEREFORE, plaintiffs demand judgment against the defendants as follows:

A. Declaring that Counts I and II of this case may proceed as a class action and certifying the plaintiffs as the Class representatives.

B. Granting plaintiffs and the Class equitable relief appropriate under the circumstances to assure that all Monogram public shareholders will receive a *pro rata* share of all consideration paid (to the Selling Defendants) and to be paid (to the public stockholders) by Nortek for the acquisition of all of the outstanding common stock of Monogram, including temporary, preliminary and permanent injunctive relief against the proposed merger.

C. Directing that any consummated purchases of Monogram stock by Nortek from the Selling Defendants be rescinded or, in the alternative, that Nortek be directed to divest itself of all such shares in such manner as the Court shall deem appropriate.

D. Directing each of the Selling Defendants to account to Monogram and the Class for all profits the Selling Defendants have made or will make on the sale of their Monogram stock.

E. Directing each of the Selling Defendants to deposit any proceeds they have received from the transactions described herein with an escrow agent appointed by the Court.

F. Directing each of the Selling Defendants to account to Monogram and the Class for all additional benefits or consideration received and to be received from Nortek as a result of the unlawful transactions described herein.

G. Awarding Monogram and the Class damages against all defendants (except Monogram), jointly and severally, for all losses and damages sustained as a result of the unlawful conduct described herein.

H. Awarding plaintiffs their costs and disbursements of this action, and reasonable fees for their attorneys and any experts.

I. Granting plaintiffs and the Class such other and further relief as to the Court may seem just and proper.

Dated: Wilmington, Delaware
June 23, 1983

MORRIS AND ROSENTHAL, P.A.

By: /s/

One Customs House Square
P.O. Box 1070
Wilmington, Delaware 19899
Attorneys for Plaintiff

OF COUNSEL:

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New York, New York 10017

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217 Broadway
New York, New York 10007

RESPONDENTS' APPENDIX 3

AFFIDAVIT OF PHILIPPE M. SALOMON

Dated May 13, 1983

EXCERPTS

[Material Omitted]
[pp. 1-2 (footnotes omitted)]

PHILIPPE M. SALOMON, being duly sworn, deposes and says:

1. I am an attorney at law, duly admitted to the Bar of the State of New York, and am a member of the firm of Willkie Farr & Gallagher, attorneys along with Leff & Stephenson, for Martin Stone ("Stone"), Harvey L. Karp ("Karp"), and George H. Levine ("Levine") named defendants in the above-captioned action. I make this affidavit in support of Messrs. Stone, Karp and Levine's motion pursuant to California Code of Civil Procedure § 418.10(a) to: (a) quash service of the summons on the ground of lack of jurisdiction of this Court over their persons; and/or in the alternative, (b) stay or dismiss this action on the ground of inconvenient forum.

[material and footnotes omitted]
[pp. 4-5]

6. Moreover, there are two actions presently pending in the Court of Chancery of the State of Delaware, County of New Castle, *Nussbacher* v. *Stone*, No. 7051, filed on December 27, 1982, and *Abramson* v. *Stone*, No. 7968, filed on January 14, 1983, both of which were commenced prior to this action. Both of those actions purport to state class action claims on behalf of all Monogram shareholders except the defendants Stone, Karp and Levine. Consequently plaintiff Terry is a member of that class and a party in those actions. Significantly, those Delaware actions allege breach of fiduciary duty by Stone, Karp and Levine arising out of their sale to Nortek of their

Monogram shareholdings—the same allegations that plaintiff Terry has attempted to plead here.

7. Consequently, *Nussbacher* and *Abramson* are pending actions which not only afford plaintiff an existing forum but also, if plaintiffs therein are successful, will provide Terry with the relief which he has requested. Thus, as set forth more fully in the accompanying Memorandum at Point II, the instant action should be dismissed on the ground of the doctrine of *forum non conveniens*.

[material omitted]

RESPONDENTS' APPENDIX 4

TERRY v. STONE, et al.

MINUTE ORDER

Dated May 16, 1983

EXCERPTS

[Material Omitted]

On the grounds of forum non conveniens motion is granted for stay without prejudice to motion to vacate the stay upon sufficient showing of change in circumstances.

[Material Omitted]

RESPONDENTS' APPENDIX 5

DECLARATION OF PHILIPPE M. SALOMON IN OPPOSITION TO PLAINTIFF'S MOTION FOR AN ORDER VACATING THE STAY OF THIS ACTION

Filed July 15, 1983

EXCERPTS

[Caption and Material Omitted]
[pp. 4-5]

The only salient fact now before the Court is that the Delaware action, a prior pending action which will fully adjudicate Terry's rights as a Monogram shareholder, remains an active pending litigation. And, Terry has not presented a single fact which has altered the circumstances upon which this Court previously ruled.

Second, the Delaware plaintiffs, on behalf of the class of the Monogram shareholders of which Terry is a member, have entered into a Stipulation of Settlement which will fully and fairly resolve Terry's claims and provide him with the relief which he now seeks before this Court. Notice of that Settlement, accompanied by a detailed Proxy Statement, will be mailed to Terry and the other Monogram shareholders as soon as the Delaware Court approves the Stipulation and issues its Order.

Thus, Terry's instant motion before this Court is premature. Terry may be fully satisfied by the Delaware Court's Order; alternatively, he may exercise certain rights under the Settlement and Delaware Corporate law or he may attempt to secure whatever other relief he believes he is entitled to at that juncture. But in view of the imminence of the Delaware Court's proposed resolution of Terry's claims, defendants Stone and Karp respectfully urge that this Court reject Terry's motion to vacate the stay so as to avoid a duplicative, unnecessary litigation and possibly inconsistent adjudications.

[Material Omitted]

RESPONDENTS' APPENDIX 6

SUPPLEMENTAL DECLARATION OF PHILIPPE M. SALOMON IN FURTHER OPPOSITION TO PLAINTIFF'S MOTION FOR AN ORDER VACATING THE STAY OF THIS ACTION

Dated July 29, 1983

EXCERPTS

[Material Omitted]
[pp. 3-5]

On July 15, 1983, the Delaware Vice Chancellor signed an Order, a copy of which is annexed hereto as Exhibit B for the Court's convenience, which, among other things, directed Terry, as a member of the Delaware class, to cease prosecution of any actions against Messrs. Stone, Karp and Levine pending final determination of whether the proposed Settlement in the Delaware actions should be approved by that Court. Specifically, Paragraph 9 of the Order provides:

> "Pending final determination of whether the Stipulation should be approved, the plaintiffs, all common stockholders of Monogram and all members of the Class or any of them, either directly, derivatively, representatively, or in any other capacity, shall not commence or *prosecute* any action asserting claims against any defendant herein which could have been or *have been asserted*, arising from or relating to any of the matters or transactions referred to in the Actions or the Stipulation." (Emphasis added)

Clearly, in the interest of the orderly administration of the proposed Delaware settlement, the Vice Chancellor has sought to retain the *status quo* while the Monogram shareholders, including plaintiff Terry, are afforded an opportunity to receive appropriate notice, evaluate the settlement terms and conditions, as well as determine whether to accept the proposal or seek alternative relief. As relevant here, notice of the proposed Delaware settlement, as part of a detailed Monogram

Proxy Statement, has been, or shortly will be, mailed to Terry and the other Monogram shareholders. And insofar as Mr. Terry believes that time is of the essence, the Notice provides for a settlement hearing in Delaware on August 25, 1983.

[Material Omitted]

RESPONDENTS' APPENDIX 7

IN THE COURT OF CHANCERY OF
THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

MOLLIE NUSSBACHER, *et al.*
Plaintiffs,

v.

MARTIN STONE, *et al.*
Defendants

CIVIL ACTION
Nos. 7051 and 7068
CONSOLIDATED

NOTICE OF PENDENCY OF CLASS AND DERIVATIVE ACTIONS, CLASS ACTION DETERMINATION, SETTLEMENT, SETTLEMENT HEARING AND RIGHT TO APPEAR

TO: ALL HOLDERS OF COMMON STOCK OF MONOGRAM INDUSTRIES, INC.

NOTICE IS HEREBY GIVEN pursuant to an Order dated July 15, 1983 (the "Order") of the Court of Chancery of the State of Delaware in and for New Castle County (the "Court") and pursuant to Rules 23 and 23.1 of the Court of the following matters which may affect your interests:

(1) There is pending in the Court consolidated derivative and class actions, *Nussbacher* v. *Stone, et al,* Civil Action No. 7051 and *Abramson* v. *Stone, et al,* Civil Action No. 7068 (the "Actions") asserting derivative and class claims against Martin Stone ("Stone"), Harvey Karp ("Karp"), George Levine ("Levine"), the directors of Monogram Industries, Inc. ("Monogram"), and Nortek, Inc. ("Nortek") with respect to the purchase by Nortek of Monogram shares owned by Stone, Karp, and Levine, and challenging the proposed merger (the

"Merger") of Monogram into and with a subsidiary of Nortek as described in the accompanying joint proxy statement (the "Proxy Statement") under "Proposed Settlement of Litigation."

(2) The parties to the Actions, which include as named plaintiffs certain stockholders of Monogram and as defendants Stone, Karp, Levine, Nortek, Monogram and the directors of Monogram, have entered into a Stipulation of Settlement (the "Stipulation") proposing the settlement of the Actions (the "Settlement") and their dismissal subject to the approval of the Court. Among other things, the Settlement provides for an increase and change in the composition of the consideration to be paid in connection with the Merger. The Settlement is conditioned on, among other things, approval of the Merger and related transactions by the common stockholders of Monogram and Nortek as provided for in the Proxy Statement. It is a condition of the Merger that the Settlement shall have been approved, a condition that may be waived by Nortek. The Stipulation and the Settlement are described in the accompanying Proxy Statement under "Proposed Settlement of Litigation—Description of Settlement." A copy of the Stipulation is attached as Exhibit V to the accompanying Proxy Statement.

(3) The Order determines that for purposes of the proposed Settlement the Actions shall be consolidated and may be maintained as a derivative action on behalf of Monogram and as a class action on behalf of a class consisting of the owners of Monogram Common Stock at the close of business on July 1, 1983 (the record date for the determination of stockholders entitled to vote on the Merger), including their successors in interest or transferees, immediate and remote (the "Class"), except for the defendants in the Actions, so the Settlement of the Actions and its dismissal if approved by the Court will be binding upon Monogram with respect to its derivative claims and upon all members of the Class with respect to the class action claims. The Class and its determination are described in the accompanying Proxy Statement under "Proposed Settlement of Litigation—Class Action Determination."

(4) A hearing will be held before the Court in its courtroom in the Public Building, 11th and King Streets, Wilmington, Delaware, on August 25, 1983, at 2:00 P.M. ("Settlement Hearing") to determine whether the Settlement of the Actions taken as a whole and the proposed Merger are fair, reasonable and adequate to Monogram and its stockholders and to the Class and to determine whether final judgment should be entered dismissing the Actions as to all defendants and with prejudice against the plaintiffs, Monogram and all of its stockholders with respect to the derivative claims and against plaintiffs and all other members of the Class with respect to the class claims. As provided in the Stipulation, the dismissal with prejudice includes all claims which were or could have been asserted against any defendant or any director, officer, employee, agent, attorney or representative of Monogram or Nortek arising out of the Actions or the matters referred to in the Actions. The Court will also determine whether, if the Settlement is approved, an application should be granted allowing payment of fees and expenses to plaintiffs' attorneys in the Actions, as provided in the Stipulation. Plaintiffs' attorneys intend to apply for an award of fees and expenses in an amount not to exceed $330,000. Any award of attorneys' fees and/or expenses to plaintiffs' attorneys in the Actions will not diminish the consideration to be paid in the Merger. If you are a member of the Class, you have a right to attend and be heard at the Settlement Hearing under certain conditions. The conditions under which you may attend and be heard at the Settlement Hearing, the nature of the Settlement Hearing, the proposed dismissal of the Actions and the effect of such dismissal upon Monogram and its stockholders with respect to the derivative claims and upon members of the Class with respect to the class claims, and the plaintiffs' attorneys' fees and expenses are described in the Proxy Statement under "Proposed Settlement of Litigation—Settlement Hearing, Dismissal of the Action and Attorneys' Fees."

The Court has reserved the right to adjourn the Settlement Hearing from time to time by oral announcement at such Hearing or any adjournment thereof, without further notice of any kind. The Court has also reserved the right to approve the Stipulation and Settlement with modifications, as may be agreed to by the parties, or without modifications and to enter its final judgment dismissing the Actions as to all defendants and with prejudice as against the named plaintiffs, Monogram and its stockholders, and all members of the Class, and to order the payment of attorneys' fees without further notice of any kind.

The description of the Actions, the Stipulation, the Settlement, the Class Determination, the Settlement Hearing and other matters as set forth herein and in the Proxy Statement does not purport to be all-inclusive. Accordingly, you are referred to the pleadings and other materials filed with the Court in the Actions, Civil Action Nos. 7051 and 7068, all of which may be examined by you or by your attorney during regular business hours of each business day at the office of the Register in Chancery, Public Building, 11th and King Streets, Wilmington, Delaware. The Court has designated Lowey, Dannenberg & Knapp, P.C., 747 Third Avenue, New York, New York 10017, Shoengold & Sporn, P.C., 217 Broadway, New York, New York, and Morris & Rosenthal, P.A., One Customs House Square, P.O. Box 1070, Wilmington, Delaware 19801 as counsel for the Class in connection with the Settlement and Settlement Hearing, and inquiries in connection with matters relating thereto may be directed to them.

If you hold of record shares of Monogram Common Stock which are beneficially owned by others, you are urged to request from Monogram additional copies of this Notice and accompanying Proxy Statement, which will be furnished to you for forwarding to the beneficial owners.

BY ORDER OF VICE CHANCELLOR

Court of Chancery of the State of
Delaware in and for New Castle County

THE STIPULATION OF SETTLEMENT IS ATTACHED AS EXHIBIT V TO THE ACCOMPANYING PROXY STATEMENT AND THE PROPOSED SETTLEMENT IS DESCRIBED UNDER THE CAPTION "PROPOSED SETTLEMENT OF LITIGATION" BEGINNING AT PAGE 51 OF THE PROXY STATEMENT.

RESPONDENTS' APPENDIX 8

NORTEK, INC. and MONOGRAM INDUSTRIES, INC.
JOINT PROXY STATEMENT

EXCERPTS

[Material Omitted]
[pp. 47-49]

Rights of Dissenting Stockholders.

If the Merger is consummated, a holder of record of Monogram Common Stock on the record date for the Monogram Special Meeting who continues to hold such shares through the effective date of the Merger and who strictly complies with the procedures set forth under Section 262 of the Delaware General Corporation Law ("Section 262") will be entitled to have such shares appraised by the Delaware Court of Chancery under Section 262 and to receive payment of the "fair value" of such shares. This Joint Proxy Statement is being sent to all holders of record of Monogram Common Stock at the record date and constitutes notice of the appraisal rights available to such holders under Section 262. The statutory right of appraisal granted by Section 262 requires strict compliance with the procedures set forth in Section 262. Failure to follow any of such procedures may result in a termination or waiver of appraisal rights under Section 262. The following is a summary of certain of the provisions of Section 262 and is qualified in its entirety by reference to the full text of Section 262, a copy of which is attached to this Joint Proxy Statement as Exhibit IV.

A stockholder of record of Monogram electing to exercise appraisal rights under Section 262 must deliver a written demand for appraisal of his shares to Monogram prior to the vote on the adoption of the Merger Agreement, and must not vote for adoption of the Merger Agreement. Such written demand must be in addition to and separate from any proxy or

vote against the Merger and must reasonably inform Monogram of the identity of the stockholder of record and of such stockholder's intention to demand appraisal of his shares. Because a proxy signed and left blank will, unless revoked, be voted for adoption of the Merger Agreement, in order to be assured that his shares are not voted for adoption of the Merger Agreement a stockholder electing to exercise appraisal rights who votes by proxy must not leave his proxy blank, but must vote against the adoption of the Merger Agreement or mark his proxy to indicate he is abstaining from voting.

Only the holder of record of shares of Monogram Common Stock is entitled to seek appraisal. The demand for appraisal must be executed by or for the holder of record, fully and correctly, as such holder's name appears on the holder's stock certificates representing shares. If the stock is owned of record in a fiduciary capacity, such as by a trustee, guardian or custodian, the demand should be made in that capacity, and if the stock is owned of record by more than one person, as in a joint tenancy or tenancy in common, the demand should be made by or for all owners of record. An authorized agent, including one or more joint owners, may execute the demand for appraisal for a holder of record; however, such agent must identify the record owner or owners and expressly disclose in such demand that the agent is acting as agent for the record owner or owners of such shares.

A record holder such as a broker who holds shares of Monogram Common Stock as a nominee for beneficial owners, some of whom desire to demand appraisal, must exercise appraisal rights on behalf of such beneficial owners with respect to the shares held for such beneficial owners. In such case, the written demand for appraisal should set forth the number of shares of Monogram Common Stock covered by it. Unless a demand for appraisal specifies a number of shares, such demand will be presumed to cover all shares of Monogram Common Stock held in the name of such record owner.

Within ten days after the effective date of the Merger, Monogram is required to send notice as to the effectiveness of

the Merger to each stockholder of Monogram who prior to the effective date of the Merger has complied with the requirements set forth above and who has not voted for the adoption of the Merger Agreement.

Within 120 days after the effective date of the Merger, Monogram or any stockholder who has complied with the provisions of Section 262(a) and (d) and is otherwise entitled to appraisal rights under Section 262, may file a petition in the Delaware Court of Chancery demanding a determination of the value of the shares of Monogram Common Stock held by all stockholders seeking appraisal. If no petition is filed by either Monogram or a dissenting stockholder within such 120-day period, the rights of all dissenting stockholders to appraisal shall cease. Stockholders seeking to exercise appraisal rights should not assume that Monogram will file a petition with respect to the appraisal of the fair value of their shares or that Monogram will initiate any negotiations with respect to the fair value of such shares. At this time, Monogram has no intention to take any action in this regard. Accordingly, Monogram stockholders who wish to seek appraisal of their shares should initiate all necessary action with respect to the perfection of their appraisal rights within the time periods and in the manner prescribed in Section 262.

Within 120 days after the effective date of the Merger, any stockholder who has complied with the provisions of Section 262(a) and (d) is entitled, upon written request, to receive from Monogram a statement setting forth the aggregate number of shares of Monogram Common Stock not voted in favor of adoption of the Merger Agreement and with respect to which demands for appraisal have been received by Monogram and the number of holders of such shares. Such statement must be mailed within 10 days after the written request therefor has been received by Monogram or within 10 days after expiration of the time for delivery of demands for appraisal under Section 262(d), whichever is later.

If a petition for an appraisal is timely filed, after a hearing on such petition, the Delaware Court of Chancery will determine which stockholders are entitled to appraisal rights and

will appraise the shares of Monogram Common Stock owned by such stockholders, determining the fair value of such shares, exclusive of any element of value arising from the accomplishment or expectation of the Merger, together with a fair rate of interest to be paid, if any, upon the amount determined to be the fair value. In determining fair value, the court is to take into account all relevant factors. In *Weinberger* v. *UOP, Inc. et al.*, decided February 1, 1983, the Delaware Supreme Court expanded the considerations that could be considered in determining fair value in an appraisal proceeding, stating that "proof of value by any techniques or methods which are generally considered acceptable in the financial community and otherwise admissible in court" should be considered, and that ". . . fair price obviously requires consideration of all relevant factors involving the value of a company . . .". The Delaware Supreme Court stated that in making this determination of fair value the court must consider market value, asset value, dividends, earnings prospects, the nature of the enterprise and any other facts which could be ascertained as of the date of the merger which throw any light on future prospects of the merged corporation. Section 262 provides that fair value is to be "exclusive of any element of value arising from the accomplishment or expectation of the merger." In *Weinberger*, the Delaware Supreme Court held that "elements of future value, including the nature of the enterprise, which are known or susceptible of proof as of the date of the merger and not the product of speculation, may be considered."

Stockholders considering seeking appraisal should have in mind that the fair value of their shares determined under Section 262 could be more, the same, or less than the consideration they are to receive pursuant to the Merger Agreement if they do not seek appraisal of their shares and that investment banking opinions as to fairness from a financial point of view are not necessarily opinions as to fair value under Section 262. The cost of the appraisal proceeding may be determined by the Court of Chancery and taxed against the parties as the Court deems equitable in the circumstances. Upon application of a

dissenting stockholder, the court may order that all or a portion of the expenses incurred by any dissenting stockholder in connection with the appraisal proceeding, including without limitation reasonable attorneys' fees and the fees and expenses of experts, be charged pro rata against the value of all shares of Monogram Common Stock entitled to appraisal. In the absence of such a determination or assessment, each party bears his own expenses.

Any stockholder who has duly demanded appraisal in compliance with Section 262 will not, after the effective date of the Merger, be entitled to vote for any purpose the shares of Monogram Common Stock subject to such demand or to receive payment of dividends or other distributions on such shares, except for dividends or distributions payable to stockholders of record at a date prior to the effective date of the Merger.

A Monogram stockholder may withdraw a demand for appraisal and accept the terms of the Merger at any time within 60 days after the effective date of the Merger, or thereafter may withdraw his demand with the written approval of Monogram.

In the event an appraisal proceeding is properly instituted, such proceeding may not be dismissed as to any stockholder without the approval of the Delaware Court of Chancery, and any such approval may be conditioned on such terms as the Court of Chancery deems just.

Nortek stockholders will not be entitled to rights of appraisal in connection with the Merger.

[Material Omitted]
[pp. 53-55]

Description of Settlement

The following discussion of the proposed settlement of the Actions is qualified in its entirety by the full text of the Stipulation of Settlement (the "Settlement Agreement") which is attached to this Joint Proxy Statement as Exhibit V. Monogram stockholders are urged to read both the Stipulation of

Settlement and the Notice of Pendency of Actions carefully and in their entirety.

Plaintiffs' counsel are of the opinion that the Actions involve complex issues of fact and law and that the outcome of the litigation is uncertain. Accordingly, plaintiffs' counsel believe that the Settlement is fair, reasonable and adequate and that it is in the best interests of Monogram, or all Monogram stockholders and of the Class to settle the Actions and the claims alleged in the manner and upon the terms and conditions described hereinafter.

Although defendants deny all allegations of wrongdoing and liability, they also consider it desirable that the Actions be settled and dismissed because such settlement and dismissal will avoid the substantial expense, inconvenience and distraction of continued protracted litigation, and will finally put to rest the claims asserted in the Actions.

The Settlement provides, subject to the approval of the Court, that all claims that are or could have been asserted in the Actions against any of the defendants, or which have been or could have been asserted against any officer, director, employee, agent, attorney or representative of Nortek or Monogram or any of the other defendants in connection with or that arise now or hereafter out of the Actions or any matters, transactions or occurrences comprising the subject matter of the Actions ("Settled Claims") shall be compromised and settled, and dismissed with prejudice upon and subject to the following terms and conditions, among others:

1. If the Settlement shall be approved by the Court, the consideration per share to be paid in the Merger to holders of Monogram Common Stock will be increased from $59.00 to $59.60. Messr. [sic] Stone, Karp and Levine will contribute $689,000 to the Settlement and will pay such amount to Nortek, which will apply such funds to increase the consideration to be paid in the Merger, and to pay expenses, including legal fees and disbursements of plaintiffs if the Settlement is finally approved. In addition, Nortek has agreed to change the consideration to be paid in the Merger, from what had been

expected to be a combination of Nortek debt and equity securities consisting of one share of Nortek Common Stock with the balance in a 25-year Nortek convertible subordinated debenture, to cash and two shares of Nortek Common Stock intended to have a value of $59.00, with the value of Nortek Common Stock for such purpose to be determined in accordance with the Merger Agreement. Nortek may determine to consummate the Merger before the Settlement is finally approved with cash and Nortek Common Stock intended to have a value of $59.00 and has agreed to pay the additional $.60 if the Settlement is subsequently finally approved.

2. Approval of the Settlement and Merger as fair, reasonable and adequate and directing consummation of the Settlement in accordance with its terms and provisions.

3. Dismissal of the Actions on the merits as to all defendants with prejudice, such dismissal to be subject only to compliance by the parties with the terms and conditions of the Settlement and any order of the Court with reference to the Settlement.

4. A permanent bar and injunction against the institution or prosecution by the plaintiffs, any member of the Class, or any other person claiming by, through or under Monogram or any member of the Class, either directly, representatively, derivatively or in any other capacity, of any other action asserting claims against any defendant herein which are Settled Claims as heretofore defined.

5. The reservation of jurisdiction over all matters related to the administration and consummation of the terms of the Settlement and the payment of attorneys' fees.

6. That the Settlement and all papers related to it are not, and shall not be construed to be, an admission by any of the defendants of any of the Settled Claims, or of the defendants' liability with respect to any such claim or of any wrongdoing by them whatsoever and shall not be offered for admission as evidence of such liability or wrongdoing.

Class Action Determination

The Court has entered an Order determining that the Actions shall be consolidated and may proceed both as derivative actions and as class actions on behalf of a class ("Class") consisting of all owners of Monogram Common Stock at the close of business on the record date for the Monogram Special Meeting, including their successors in interest or transferees, immediate and remote, except the defendants named in the Actions. Under the rules of the Court, the approval of the Settlement and the dismissal with prejudice pursuant thereto of the Actions would be binding on Monogram and its stockholders with respect to the derivative claims, all members of the Class with respect to the class action claims, and would preclude any member of the Class from litigating in the future any of the Settled Claims. The Order determining the Actions to be a class action is effective only for purposes of Settlement.

Settlement Hearing, Dismissal of the Actions and Attorneys' Fees

The Settlement must be approved by the Delaware Court of Chancery to become effective. A hearing will be held on August 25, 1983, at 2:00 P.M. in the Court of Chancery in the Public Building, 11th and King Streets, Wilmington, Delaware 19801 (the "Settlement Hearing") to determine whether the Settlement of the Actions taken as a whole is fair, reasonable and adequate and to determine whether final judgment should be entered dismissing the Actions as to all defendants and with prejudice. As provided in the Settlement, the dismissal with prejudice precludes all claims which were or could have been asserted against any defendant or any director, officer or representative of Nortek or Monogram arising out of the Actions or the matters referred to in the Actions. The Court will also determine whether, if the Settlement is approved, an application should be granted allowing payment of fees and expenses to plaintiffs' attorneys in the Actions as provided in the Settlement Agreement and to rule on such other matters as the Court may deem appropriate.

Any Monogram stockholder or member of the Class who objects to the Settlement or to the judgment to be entered in the Actions, or to the award of attorneys' fees to plaintiffs' counsel (described hereinafter), or who otherwise wishes to be heard, may appear in person or by his attorney at the Settlement Hearing and present any evidence or argument that may be proper and relevant. The Order scheduling the Settlement Hearing provides, however, that no persons other than the named plaintiffs and the named defendants to the Actions shall be heard, and no papers, briefs, pleadings, or other documents submitted by any such person shall be received and considered by the Court, unless no later than ten (10) days prior to the Settlement Hearing (i) notice of intention to appear, (ii) a statement of such person's objections to any matter before the Court and (iii) the grounds therefor or any reasons for such person desiring to appear and to be heard as well as all documents or writings which such person desires the Court to consider, shall be filed by such person with the Register in Chancery, 11th and King Streets, Wilmington, Delaware 19801, and, on or before such filing, shall be served upon the following counsel of record:

Joseph A. Rosenthal, Esq.
Morris & Rosenthal, P.A.
One Customs House Square
P.O. Box 1070
Wilmington, DE 19899
Attorneys for Plaintiffs

Robert K. Payson, Esq.
Potter Anderson &
Corroon
Delaware Trust Building
P.O. Box 951
Wilmington, DE 19899
Attorneys for Defendants, Monogram, Philip L. Ball, Frederick G. Worden, Mitchell W. Spellman and Alfred S. Gainsley

Allen M. Terrell, Jr., Esq.
Richards, Layton &
Finger, P.A.
One Rodney Square
P.O. Box 551
Wilmington, DE 19899
Attorneys for Defendants, Nortek, Ralph R. Papitto, Richard L. Bready and John A. Dodenhoff

Martin P. Tully, Esq.
Morris, Nichols, Arsht
& Tunnell
1105 N. Market Street
P.O. Box 1347
Wilmington, DE 19899
Attorneys for Defendants, *Martin Stone, Harvey L. Karp and George Levine*

Service may be made by mailing by first class mail, postage prepaid, the notice of intention to appear and related materials to the persons listed above at the addresses shown.

Unless the Court otherwise directs, no holder of Monogram Common Stock and no member of the Class shall be entitled to object to the Settlement or to the judgment to be entered herein, or the award of attorneys' fees to plaintiffs' counsel, or otherwise to be heard, except by serving and filing written objections as described above. Any person who fails to object in the manner prescribed above shall be deemed to have waived such objection and shall be forever barred from raising such objection in this or any other action or proceeding.

If the Court approves the Settlement and if other conditions to the Settlement are fulfilled, plaintiffs' attorneys-of-record in the Actions collectively will apply to the Court for an award of attorneys' fees and disbursements not to exceed $330,000. Such application may be presented, at the option of plaintiffs' attorneys, at or subsequent to the Settlement Hearing. The defendants have agreed not to oppose such application by plaintiffs' attorneys. The selling defendants and Nortek have agreed to pay or cause to be paid such fees and expenses up to $330,000 as the Court may approve, provided such fees and expenses shall not be payable unless and until the later of the consummation of the Merger or the Final Order and Judgment, as provided in the Settlement Agreement, shall be finally affirmed on appeal, or by lapse of time or otherwise shall not

be subject to appeal. Nortek and Monogram will pay the costs of the notice. Plaintiffs shall have no responsibility for any of such costs regardless of whether the Settlement is consummated.

There is pending in the California state court another action against Messrs. Stone, Karp and Levine and Monogram challenging the sale of the 30% block. See "Legal Proceedings." See also "Special Factors—Stock Purchase Agreement; Transactions With Affiliates."

[Material Omitted]
[p. 83]

Monogram.

See Notes 13 and 19, Notes to Monogram Consolidated Financial Statements, appearing elsewhere herein and incorporated herein by reference. In addition to the Actions, a Monogram stockholder, Charles Terry, filed an individual action in California against Martin Stone, Harvey Karp, George Levine and Monogram alleging that Messrs. Stone, Karp and Levine, aided and abetted by Monogram, breached their fiduciary duties in connection with the sale of the approximate 30% block of Monogram Common Stock to Nortek (Cal. Sup. Ct. Civil Action No. WECO78784). Plaintiff Terry seeks compensatory and punitive damages in an unspecified amount from the defendants on the grounds that the defendants did not offer or permit the plaintiff to participate in such sale. If the settlement of certain pending litigation is approved, the defendants presently expect to move to dismiss that action. See "Proposed Settlement of Litigation."

Monogram has used various substances in its products and manufacturing operations which have been or may be deemed to be hazardous or dangerous, and the extent of its potential liability under environmental, product liability, and workmen's compensation statutes, rules, regulations and case law is unclear, although any such problems would be likely to be greater at Monogram's older facilities utilized by its Electrical Mate-

rials Group. The impact of present regulations and any future regulations on Monogram's financial position cannot be accurately predicted, although Monogram is not presently aware of any material liability.

[Material Omitted]

RESPONDENTS' APPENDIX 9

NUSSBACHER v. STONE, et al.

STIPULATION OF SETTLEMENT

EXCERPTS

[Caption Omitted]
[p. V-1]

STIPULATION OF SETTLEMENT

WHEREAS there have been alleged in the above-captioned actions (the "Actions") certain claims against defendants on behalf of a class of the stockholders of Monogram Industries, Inc. ("Monogram") and derivative claims on behalf of Monogram.

[Material Omitted]
[p. V-3]

WHEREAS in order to settle the Actions and put all of the claims alleged by plaintiffs on behalf of Monogram and to shareholders other than Nortek to rest, if this settlement as set forth hereinafter is approved and the Settled Claims as defined hereinafter are finally dismissed with prejudice as provided hereinafter, the defendants Stone, Karp and Levine will pay the sum of $689,000 in the settlement of all claims against them which were alleged or could have been alleged in the complaints filed in the Actions or proposed to be filed in the Actions, whether asserted directly, representatively, derivatively, or in any other capacity, that arise now or hereafter out of the Actions, the Stock Purchase Agreement, the proposed Merger of Monogram with a subsidiary of Nortek (the "Merger") or any other matters, transactions or occurrences comprising the subject matter of the Actions by tendering said sum to Nortek, upon final approval of this Settlement by this Court, which sum Nortek will apply to satisfy its obligations

under this Settlement, including to increase the value of the consideration to be paid by Nortek to Monogram shareholders in the Merger in the event the Settlement of the Actions shall be approved by this Court and such approval becomes final as provided in paragraph 5 hereof, and Nortek, in settlement of all claims against it which were alleged or could have been alleged in the complaints filed or proposed to be filed in the Actions, whether asserted directly, representatively, derivatively, or in any other capacity, that arise now or hereafter out of the Actions, the Stock Purchase Agreement, the Merger or any other matters, transactions or occurrences comprising the subject matter of the Actions, has agreed to increase further the amount to be paid in the Merger for each Monogram share from $59.00 to $59.60 in the event the Settlement of the Actions shall be approved by this Court and such approval becomes final as provided in paragraph 5 hereof, and to change the terms of payment of such amount from one share of Nortek Common Stock and the balance in a Nortek 25-year convertible subordinated debenture, to two shares of Nortek Common Stock and the balance in cash with the number of shares of Nortek Common Stock subject to adjustment as provided in the Agreement and Plan of Merger. (the "Revised Merger Terms").

[Material Omitted]
[p. V-4]

AGREEMENT:

IT IS STIPULATED AND AGREED, subject to the approval of the Court, pursuant to Rules 23 and 23.1 of Rules of the Court of Chancery, that the Actions, and all claims which were alleged or could have been alleged in the complaints filed in the Actions or proposed to be filed therein, whether asserted directly, representatively, derivatively, or in any other capacity, against the defendants Nortek, Monogram, Ball, Worden, Spellman, Gainsley, Papitto, Bready, Dodenhoff, Stone, Karp, and Levine, or any of them, or against any present or former

officer, director, agent, attorney, or representative of the defendants, that arise now or hereafter out of the Actions, the Stock Purchase Agreement, the Merger or any other matters, transactions or occurrences comprising the subject matter of the Actions (the "Settled Claims") shall be compromised and settled, released and discharged, and dismissed with prejudice upon and subject to the following terms and conditions (the "Settlement"):

[Material Omitted]
[p. V-5]

(b) If the Settlement shall be approved by this Court, Nortek may determine to consummate the Merger prior to such approval becoming final (as provided in Paragraph 5 hereof), and in such event, each share of Monogram common stock (except for shares held by Nortek or Monogram or whose holders have exercised Appraisal Rights) will be converted into the right to receive two shares of Nortek common stock and cash having an aggregate value of $59.00 determined as provided in such agreement and plan of merger and with the number of shares of Nortek Common Stock subject to adjustment as provided in such agreement and plan of merger. If the Merger is so consummated, Nortek will distribute an additional $.60 in cash with respect to each share of Monogram common stock converted as aforesaid within ten days after the approval of this Settlement shall become final (as provided in Paragraph 5 hereof).

[Material Omitted]

3. Notwithstanding the above, any Class member (and any other Monogram shareholder) may, in connection with the Merger, demand appraisal of his or her Monogram shares in accordance with Section 262 of the Delaware General Corporation Law.

4. The parties contemporaneously herewith have agreed upon a form of Order, attached hereto as Exhibit A, providing for certification of the Actions as a class action in accordance

with Paragraph 1 hereof, the establishment of a date for a hearing on the fairness, reasonableness and adequacy of the Settlement and the method for giving notice of the Settlement and hearing thereon to the Monogram shareholders and the Class. As soon as practicable after this Stipulation has been executed, the parties shall jointly move this Court for entry of said Order and further shall jointly move for approval of this Stipulation of Settlement and for entry of the Order and Final Judgment referred to in Paragraph 5 hereof. At the hearing all parties to this Stipulation shall urge the Court to approve the Settlement.

[Material Omitted]
[p. V-6]

6. If the Settlement (including any modification thereto made with the consent of the parties as provided for herein) and the Merger, and all transactions preparatory or incident thereto, shall be approved by this Court following a hearing, the parties shall jointly request this Court to enter an Order and Final Judgment:

(a) Approving the settlement and the Merger, and all transactions preparatory or incident thereto, as fair, reasonable and adequate and directing consummation of the settlement in accordance with its terms and provisions;

(b) Dismissing the Actions on the merits as to all Defendants with prejudice as against the plaintiffs and all Monogram shareholders, Monogram, and all members of the Class, without costs, except as hereinafter provided, such dismissal to be subject only to the Merger becoming effective in accordance with its terms and compliance by the parties with the terms and conditions of this Stipulation and any order of this Court with reference to the Stipulation or the Merger;

(c) Permanently barring and enjoining the institution or prosecution by any of the plaintiffs or any Monogram shareholder, Monogram or any member of the Class, either directly, representatively, derivatively or in any other capacity, of any other action asserting claims against any Defendant herein, or against the officers. directors, agents, attorneys and representatives of Monogram, Nortek or any of the Defendants which are Settled Claims as heretofore identified; and

(d) Reserving jurisdiction over all matters relating to the administration and consummation of the terms of this Stipulation and the payment of attorneys' fees and expenses.

[Material Omitted]

RESPONDENTS' APPENDIX 10

NUSSBACHER v. STONE, et al.

ORDER

Dated July 15, 1983

[Caption Omitted]
[pp. 1-2]

The parties in the above-captioned actions (the "Actions"), by their attorneys, having moved the Court for an Order pursuant to Chancery Court Rules 23 and 23.1, determining that for purposes of settlement the Actions may be consolidated and as so consolidated be maintained as both derivative and class actions and fixing certain matters in connection with the proposed settlement of the Actions in accordance with the Stipulation of Settlement (the "Stipulation" or "Settlement") entered into by the parties, dated June 22, 1983, and for the dismissal with prejudice of the Actions upon the terms and conditions set forth in the Stipulation.

NOW, upon such motion and after consideration of the Stipulation, IT IS HEREBY ORDERED this 15th day of July, 1983 that:

1. For purposes of settlement only: (a) *Nussbacher* v. *Stone, et al*, Civil Action No. 7051 and *Abramson* v. *Stone, et al*, Civil Action No. 7068 are hereby consolidated; (b) the Consolidated Amended Complaint dated June 23, 1983 shall be filed in substitution for all prior complaints; (c) these Actions shall be maintained both as derivative actions with respect to Count III of the Consolidated Amended Complaint on behalf of Monogram Industries, Inc. ("Monogram") pursuant to Chancery Court Rule 23.1 and as class actions with respect to Counts I and II of the Consolidated Amended Complaint pursuant to Chancery Court Rule 23(a) and (b)(2) on behalf of a class consisting of all owners of common stock of Monogram at the close of business on the record date for the special meeting of stockholders of Monogram called for the purpose of voting on the Merger, including their successors

in interest or transferees, immediate and remote, except the defendants named in the Actions ("Class"); and (d) the named plaintiffs in Civil Actions Nos. 7051 and 7068, Mollie Nussbacher and Alan Abramson, shall be the Class representatives and Lowey, Dannenberg & Knapp, P.C., 747 Third Avenue, New York, New York 10017; Shoengold & Sporn, P.C., 217 Broadway, New York, New York, and Morris & Rosenthal, P.A., One Customs House Square, P.O. Box 1070, Wilmington, Delaware 19801, shall be derivative and Class counsel in the Actions.

[Material Omitted]

RESPONDENTS' APPENDIX 11

NUSSBACHER v. STONE, et al.

FINAL ORDER AND JUDGMENT

Filed August 25, 1983

EXCERPTS

[Material Omitted]
[pp. 2-4]

IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. The Notice of Pendency of Actions, Class Action Determination, Settlement, Settlement Hearing and Right to Appear, which was mailed on July 19 and 20, 1983, to the holders of record of the common stock of Monogram as of the close of business on July 1, 1983, in accordance with the Court's order of July 15, 1983, is hereby determined to be adequate, sufficient and the best notice practicable under the circumstances.

2. The parties have fully complied with Rules 23 and 23.1 of the Rules of this Court, and due and adequate notice of this proceeding has been given, and full opportunity to be heard has been offered to all parties and persons in interest.

3. The Court hereby approves the terms of the Stipulation of Settlement, the Merger contemplated thereby, and the compromise and settlement of the Settled Claims as defined in the Stipulation of Settlement as fair, reasonable and adequate and in the best interests of Monogram and all of its shareholders and of the Class, and the parties to said Stipulation of Settlement are directed to comply with and consummate said settlement in accordance with the terms of said Stipulation of Settlement.

4. These consolidated Actions are (i) hereby dismissed on the merits as to all defendants and with prejudice, as against the plaintiffs and all Monogram shareholders, Monogram, and

all members of the Class, and (ii) the defendants, their subsidiaries, affiliates, parents, divisions, predecessors, successors, and assigns, and their present and former members, officers, directors, trustees, employees and agents, and their respective heirs, administrators and executors are hereby released and discharged from any and all liability, claims, demands, or causes of action that arise now or hereafter out of the consolidated Actions, the Stock Purchase Agreement or Merger as these terms are defined in the Stipulation of Settlement, or any other matters, transactions or occurrences concerning the subject matter of the consolidated Actions, including all matters which were alleged or which could have been alleged in the consolidated Actions. This judgment shall be final and conclusive with respect thereto.

5. The plaintiffs and each and all of the members of the Class, and all persons claiming by, through or under Monogram, its shareholders or the members of the Class, or any of them, are hereby severally and perpetually enjoined from instituting or prosecuting any suit or other proceeding in any Court of this or any other jurisdiction, whether asserted directly, representatively, derivatively, or in any other capacity, against the defendants Nortek, Monogram, Ball, Worden, Spellman, Gainsley, Papitto, Bready, Dodenhoff, Stone, Karp, and Levine, or any of them, or against any present or former officer, director, agent, attorney, or representative of the defendants, that arise now or hereafter out of the consolidated Actions, the Stock Purchase Agreement or Merger, as those terms are defined in the Stipulation of Settlement, or any other matters, transactions or occurrences comprising the subject matter of the consolidated Actions, including all matters which were alleged or which could have been alleged in the consolidated Actions; provided, however, that no provision hereof shall affect the right of any person entitled thereto to demand appraisal of his or her Monogram shares in accordance with 8 *Del.C.* § 262 if the proposed Merger contemplated by the Stipulation of Settlement is consummated.

[Material Omitted]

RESPONDENTS' APPENDIX 12

ORDER DISMISSING ACTION

Dated July 2, 1984

EXCERPTS

[caption omitted]
[pp. 1-2]

This Court, the Honorable Jerry Pacht presiding, having by its Minute Order of May 25, 1984, granted the motions of defendants MARTIN STONE, HARVEY L. KARP and MONOGRAM INDUSTRIES, INC., for dismissals as to them pursuant to C.C.P. §§ 430.10 and 430.30;

IT IS HEREBY ORDERED that the complaint on file herein, and this action, are hereby dismissed as to defendants Martin Stone, Harvey L. Karp, and Monogram Industries, Inc.

Dated: JUL 2 1984

/s/
JUDGE OF THE SUPERIOR COURT